BEFORE THE LANE COUNTY HEARINGS OFFICIAL

Lane County,	)	
	)	
v.	)	MOTION FOR RECONSIDERATION
	)	BY LANE COUNTY
ATR LAND, LLC, LEELYNN, INC. and	)	
WILEY MT., INC.,	)	File: CA 10-0200
	)	
Appellants	)	

COMES NOW LANE COUNTY, by and through Assistant County Counsel Marc Kardell, and hereby moves for reconsideration of the decision of February 14, 2012, for the reasons set forth below.

INTRODUCTION

With respect, the Hearings Official made several errors that should be corrected, and which would consequently affect the decision in this case. A substantial part of the rationale for this reconsideration request is the 1995 decision (PA 0399-94, RESPONSE TO MOTION FOR DISMISSAL) referenced earlier by the parties. That decision (hereafter "the 1995 decision") looked at the exact language at issue here, including the issue of whether or not the 200 foot buffer precluded site review, and also including the language pointing from Lane Code 16.216(5). Without finding the specific exemption applicable to the quarry operator, the decision found the substantive provisions of LC 16.257 were intended to be followed for quarry operations. If that analysis was either correct or a reasonable interpretation of the Code, then the current decision is contrary and at least shows that the Code language may be ambiguous. If that is the case, the County may interpret the language, subject to later review for reasonableness of that interpretation, and for compliance with other laws such as due process.

The current decision also should be reconsidered to correct #17 on page 5, that the second Notice of Failure To Comply reduced the violations. Those violations were in addition to those listed in the previous Notice. Similarly, under #1 on page 2, the Appeal hearing was on two Notices, plural. On page 3, #2, the map and tax lot is not correct where it references 16-04-20. That description is correctly stated on page 1 as 19-01-20. Also the same error appears on page 5, at #19.

With the foregoing as an overview, this memorandum will attempt to begin its analysis with an examination of the applicable Code language.

LANE CODE PROVIDES FOR DISCRETION

First, in the decision here at issue (hereafter "the current decision"), reference is made to "the plain meaning of the caption and title of Lane Code 16.257(3)" and, in the second paragraph on that same page six, "the caption or introductory title of Lane Code 16.216(5)." However, Lane Code governs any weight which might be given to titles, and specifically provides that the titles are not a part of the operative language in the respective section.

> **"1.030 Titles of Sections.**
> The titles of the several sections of this Code are intended as descriptions to indicate the contents of the section and shall not be deemed as a part of the section, nor, unless expressly so provided, shall they be so deemed when sections, including the title, are amended or reenacted."

This language is not surplusage nor ambiguous. If one then reads LC 16.257 apart from the titles, Lane Code 16.257, underlined for emphasis, reads as follows:

> **"16.257 Site Review Procedures.**
> (1) **Purpose.** It is the purpose of this section to establish a Site Review Permit procedure for specified uses or applications requiring comprehensive review of proposed site development in order to encourage the most appropriate development of the site compatible with the neighborhood, to prevent undue traffic and pedestrian hazards or congestion, to reduce adverse impacts upon public facilities and services, and to provide a healthful, stable, efficient and pleasant on-site environment.
> (2) **Site Review Permits Required.** A Site Review Permit shall be required when:
> (a) Nonresidential uses, except those customarily provided in conjunction with farm uses, are proposed for properties where the proposed uses and/or structures are within 200 feet of the boundaries of an RR-RCP; RA-RCP; R-2-RCP; RG-RCP or RP-RCP zone.
> (b) Incidental to conditional approval to rezone as provided in this chapter.
> (c) Incidental to any Zoning or Rezoning Application approval when it is determined by the Board, Planning Commission or Hearings Official that a Site Review Permit would be necessary to ensure that such approval would be consistent with the intent and purposes of this chapter.
> (d) Incidental to an expansion of a nonconforming use of land and structures as permitted in this chapter.
> (e) Superceded provisions of this chapter for property zoned with an Architectural Control ("X") suffice require approval of initial plans, or approval of a modification of or addition to approved plans.
> (f) A zone in this chapter specifically requires a Site Review Permit for uses permitted outright or conditionally in said zone.
> Any properties requiring a Site Review Permit pursuant to LC 16.257(2)(c) above shall be designated "SR" in the amending ordinance or order, on a map attached as an exhibit to the ordinance or order, and on the Zoning Map, as applicable.
> No Building Permit shall be issued until a Site Review Permit has been obtained as required by this section. Further, said Building Permit can be issued only for development as approved according to the Site Review Permit requirements.

(3) **Site Review Permits Not Required.** It is not necessary to require a Site Review Permit when:

(a) The proposed uses or improvements are for a residential use or a use customarily provided in conjunction with a farm use.

(b) A Conditional Use Permit or Special Use Permit is required for the proposed uses or improvements.

(c) The proposed uses or improvements are located at least 200 feet from all exterior boundaries of the subject property.

(d) The proposed improvement is a sign for a use permitted by the parent zone and such sign is not illuminated, does not occupy more than 100 square feet in sign surface area on one side, is of no greater height than the primary buildings on the same property, and is not within the structural setback area designated by LC Chapters 10 and 15.

(e) When the proposed use or improvement is a minor addition to an existing commercial or industrial use or improvement where the minor addition does not exceed 25 percent of the area of the existing use and will not be closer to a property line than the closest portion of the existing structures meeting legal setbacks required by the appropriate zone. For purposes of this section, the area of the existing use shall be calculated by including all improvements, on-site private drives and outside areas which are a part of the use (such as off street parking and loading areas and outside storage areas.)

(f) The proposed use is a transportation facility or use listed in LC 16.265(3)(a) through (m)."

Unlike the titles, the text is not a mirror image when one looks at (2) vs. (3), above. Had mirror language been used, then a clear indication would exist that "no site review shall be required when" the listed factors are present. That is not the case, however, and one must assume that different language was used because a different meaning was intended. To say that it is not necessary to require something is materially different from saying that something shall not be required.

DUE PROCESS ALLOWS COUNTY DISCRETION

Nor is there any reason to believe that this reading is necessarily violative of due process. Agencies frequently have discretion to, in this instance, not require site review if some use is requested that is not reasonably likely to affect neighbors. Any such exercise of discretion is constrained by the text, context, and purpose of the applicable Code provisions. It is subject to review, as to a reasonable connection with underlying Board ordinances, with the agency's own rules and practice, and with State and Federal laws. Absent a ruling that no legal application of the Code section may be made at all, only an as applied attack of the agency action may lie. Here, the application of the Code section is consistent with other sections that the 1995 decision pointed to, including LC 16.257(4), and LC 16.257(5), and in addition to that, what the

County would point to, 16.257(1), and LC 16.216(1)(c), (e), (f), and most significantly for this review, (g).

The current decision raises *Fasano v. Washington Co. Comm.*, 264 Or. 574, 583, 507 P 2d 23 (1972) in the context of the application of discretionary standards and due process. This issue relates to the Code language referenced immediately above. The Court in *Fasano*, however, held that the action of the Board in that case needed to be examined in light of broad standards applicable to Oregon land use law. In finding that the change in zoning to allow greater densities sought by a developer and approved by Washington County had been correctly reversed by the trial court, the Oregon Supreme Court, looking at the relevant statute, reasoned as follows:

> "In addition, ORS 215.055 provides:
>
> '215.055 Standards for plan. (1) The plan and all legislation and regulations authorized by ORS 215.010 to 215.233 shall be designed to promote the public health, safety and general welfare and shall be based on the following considerations, among others: The various characteristics of the various areas in the county, the suitability of the areas for particular land uses and improvements, the land uses and improvements in the areas, trends in land improvement, density of development, property values, the needs of economic enterprises in the future development of the areas, needed access to particular sites in the areas, natural resources of the county and prospective needs for development thereof, and the public need for healthful, safe, aesthetic surroundings and conditions.'
>
> We believe that the state legislature has conditioned the county's power to zone upon the prerequisite that the zoning attempt to further the general welfare of the community through consciousness, in a prospective sense, of the factors mentioned above. In other words, except as noted later in this opinion, it must be proved that the change is in conformance with the comprehensive plan."

Fasano then, stands for, inter alia, that the application of discretion must be guided by all applicable laws. The Washington County Board was not simply free to change a zone designation without articulating how that change complied with the law. If discretion may be reasonably exercised in this case, considering all of the goals and purposes of the applicable provisions, which clearly call for examination of both "sides" of the proposed use, than site review may be required. To what degree the site review impacts the proposed use is subject to review at the Hearings level and beyond.

COUNTY INTERPRETATION IS ALLOWED

The 1995 decision, and the County's subsequent following of that analysis in the current case is consistent with the Code references set forth above, and with the general construction of State law as set forth in statute as well as in *Fasano* and its progeny. County's initial post-hearing brief cited *Friends Of The Columbia River Gorge, Inc. v. Columbia River Gorge Commission*, 346 Or. 415, 212 P.3d 1243 (2009). That Supreme Court case makes clear, at 431, fn 14, that

"Oregon courts...will defer to agency's interpretation of its own rule if the interpretation is plausible and not inconsistent with the rule, the rule's context, or any other source of law." (Citations omitted.) As pointed out in the County's earlier brief, the County here followed exactly the entire second section of analysis in the previous order in PA 0399-94. That decision by the County is entitled to deference. If it was a plausible interpretation of the applicable law, it is not to be decided differently now or by any court on appeal. If the law is not facially invalid and if it is plausibly applied, that suffices for the Oregon courts.

To rule that the Lane Code process that governs Site Review cannot be read to allow review of these or other quarry operations either inside or outside of the 200 foot area identified in LC 16.257(3) because due process forbids it is not consistent with any case precedent. There are statues, see statutory references in *Fasano*, and Code provisions, see supra, that may guide the exercise of discretion by the County, at least sufficiently to allow the Site Review process to be required. If the County unreasonably impacts any party to that process review is clearly allowed both under Lane Code and at higher levels such that due process would be protected.

LC 16.257(3) DOES NOT UNAMBIGUOUSLY PROHIBIT SITE REVIEW

The present decision provides on page 6 that the language underlined in (3) above is clear. "Nor is the following language that states 'it is not necessary to require a Site Review Permit...' ambiguous." However in the previous decision in PA 0399-94, decided in February of 1995, the same language was found to be clear, but in a totally different direction. It was argued there by the property owner that site review was not required. The decision specifically addressed the 200 foot boundary area. The **bolded language below is from the decision and represents one of "two rationales** (that) have been offered in support of this contention (of the applicant 'that a site review permit is not required')." Here's that Hearings Official text (underlining supplied):

> **"2 . LC 16.216(5), in conjunction with LC 16.257, does not automatically require site review.**
> The applicant argues that LC 16.216(5), that states that uses enumerated in LC 16.216(4)(a), (b), (c), (d), and (e) are "subject to" LC 16.257, should be interpreted to require a determination as to whether LC 16.257(3) exempts the subject use. The Hearings Official believes there is a less tortuous way of reading LC 16.216 and LC 16.257 together. It is the opinion of the hearings official that Lane Code 16.216(5) is intended to be a general "pointer" to LC 16.257. There are two reasons for this interpretation. First, if the applicant's interpretation were correct, there would be several ways to better clarify that intent in the drafting of LC 16.216(5). LC 16.216(5) could state, for instance, that the enumerated uses are subject to site review unless exempted by LC 16.257(3). Also, an examination of LC 16.257(3) reveals that only LC 16.257(3)(c)(footnote 2, below) is likely to apply to an aggregate extraction site. If LC 16.216(5) were drafted to give a clear expression to the applicant's interpretation then it would state that enumerated uses which are more than 200 feet from exterior property lines are exempted from site review.

> Second, it is reasonable to expect LC 16.216(5) to generally refer to LC 16.257 as there is more than one section of LC 16.257 that applies to uses subject to site review. Thus, LC 16.257(2)(f) notes that a site review permit is necessary when a zone specifically requires it, as is the present case. Also applicable is LC 16.257(4), which sets out site review evaluation criteria, and LC 16.257(5), which allows the imposition of reasonable conditions.
>
> [2]LC 16.257(3)(c) exempts from site review uses or improvements that are located at least 200 feet from all exterior property boundaries."

The Hearings Official in that 1995 case held that Site Review was required, because the language in LC 16.257(2)(f) required it and contrary language could have been easily set forth in the QM zone if the Code intended to exempt operations located more than 200 feet from the property line. That decision clearly held that this was "a zone which specifically requires it, as is the present case." That is wholly at odds with the current determination that the same Code section unambiguously mandates that no site review may occur. The distinction of an operational boundary is also without import under the 1995 analysis. One cannot square the current case with the holding in the 1995 case "that enumerated uses which are more than 200 feet from exterior property lines are exempted from review" is not the case because the Code language did not clearly so state. One cannot square the above language with the current holding that "If a use listed in Lane Code 16.257(3) is present then it does not require a site review permit." These uses either are subject to review, or they are not.

The aggregate applicant in 1995 contended that uses (the relevant term, not a self-designated "operational setback") were not subject to site review, so then wouldn't it still be true that "If LC 16.216(5) were drafted to give a clear expression to (that) interpretation then it would state that enumerated uses which are more than 200 feet from exterior property lines are exempted from site review"? It is the same "use" being analyzed, and the same 200 foot area. What Defendants point to as a line that makes all the difference, in fact makes no difference if the uses are the same and the language covering the 200 foot area is the same. The only relevant thing not the same is that in 1995 the applicant was directed "to proceed through the site review process," and in the current case the holding that "I do not find any justification in either Lane Code 16.216 or 16.257 to require that site review be applied to the aforementioned activities." The 1995 decision included looking at extraction activities in relation to the 200 foot line. Site review was then required despite the contention that making use of the 200 foot area could obviate that requirement. That decision has been relied on, has stood the test of time and was a reasonable interpretation of what uses would be allowed only if subject to site review. Whether a line has now been drawn does not affect the analysis that examined that same de facto line referenced in 1995.

TRANSPORTATION IS NECESSARY AND 16.257(3) DOES NOT APPLY

The previous decision correctly found that the QM pointer was to Site Review. LC 16.216(5) says that the uses permitted "shall be subject to the provisions of LC 16.257 (Site Review). "Site

Review" likely has meaning, and should guide the interpretation of the previous portion of that sentence. If one looks then to LC 16.257(6), it says "Application for a Site Review shall be made as provided by LC 14.050." Throughout LC 16.257 there are various references to "Site Review Permit," "Site Review Applications," and to "Applications for Site Review." The pointing to LC 16.257 and the mention of "(Site Review)" simply does not unambiguously tell us whether the placing of parenthesis around the words and/or the use of the words "Site Review" means that the process is or is not intended. A plausible interpretation, and one adopted in 1995, is that "LC 16.257(2)(f)notes that a site review permit is necessary when a zone specifically requires it, as is the present case." In other words, that LC 16.216 required Site Review.

The current decision goes on to look at a second prong for imposition of fines, that the transportation activities within the 200 foot area separately allows for imposition of site review. The decision states on page 7, "the larger question is whether the uses accessory to mineral extraction and the existing roads that lie in the setback area are subject to site review. I strongly believe that they should be...." It then goes on to say "Further, if all the mineral excavation activities listed in Lane Code 16.216(4)(a)-(e) occur outside of the 200-foot setback area, and are therefore exempt from site review permit requirements, I do not see how the Code can be interpreted to require site review of their accessory uses even though those uses occur within the setback area and outside of the boundaries of the subject property." This seems circular. The transportation should be subject to site review, but because it's an accessory use the Code can't be interpreted to allow that or that would swallow up the site review exemption that the Hearings Official believes is present. That exemption is not present in large part because this type of reasoning would never allow site review of transportation (let alone mining) impacts, if the on-site activity was otherwise permitted but required non-public transportation. Impacts from traffic that could be just a few feet from neighboring residences would be permitted without site review under this reasoning. That is clearly not the intent of any Code provision, as setbacks are necessary almost everywhere in Lane Code. But the current ruling, if undisturbed, allows all sorts of accessory uses and disturbances right to the very edge of the real property.

The only transportation exception in LC 16.216 (4) are for public transportation facilities, see LC 16.216(4)(o). There are cases that hold that on-site necessary or accessory transportation uses must be viewed as a part of the underlying use that they serve. The Defendants have argued that these cases cannot be correct, because they would practically not allow the underlying use *to proceed without site review.* Yet even the underlying allowable uses themselves were not allowed in *Wilson v. Washington County*, LUBA No. 2011-007, *Bowman Park v. City of Albany*, 11 Or LUBA 197 (1984), and *Roth v. Jackson County*, 38 Or LUBA 894 (2000). In each of those cases, underlying uses allowed on site were not permitted to continue where necessary transportation uses were in zones that did not permit the dominant activity. This Parvin Butte case, however, lacks even the different zone, but instead has merely a self imposed operational boundary, one that contains roads that were built up by the current owner in order to facilitate mining. Why the necessary and accessory transportation uses on the mining property in the mining zone are not counted as occurring as part of the mining activity (though necessary by Defendant's own evidence) is answered only by the determination that this simply can't be the

law. But the cases clearly hold, including the *Wilson* case decided in 2011, that "the internal driveway on that property that connects the commercial or industrial buildings to the nearest public right of way is properly viewed as part of the commercial industrial use." If that is the case in different zones, must it still not be the case in the same zone? LUBA in the same case, in describing its similar holding in *Bowman Park*, said that the holding there was "Based in part on the city's definition of 'use' and 'development' that included the establishment of access, we concluded that the proposed industrial use included access to that industrial use." The reading in the current case that these accessory and necessary transportation uses must be allowed where the underlying use is allowed is an implicit recognition that the accessory transportation use is a part of the dominant extraction use. LUBA similarly noted in *Bowman Park* that "Case law from other jurisdictions supports petitioner's argument that an access road to an industrial site is an accessory industrial use which cannot be established on residentially zoned land." At p. 203, citations omitted. Any fair reading of these cases leads to an inescapable conclusion that transportation or other necessary or accessory uses are in fact a part of the dominant activity, and must so be considered. That means that site review is required because the mining activity, as defined by cases that require consideration of accessory uses, is occurring within the 200 foot area.

That also means that LC 16.216(5), the pointer statute, as to mining operations likely does not point to LC 16.257(3), because the entire mining use would seldom not impact the 200 foot area described in LC 16.257. The fact that someone calls a use, per LC 16.216(4)(k), "necessary and accessory," when in fact it is a part of the underlying extraction, processing or sale of the product, that dominant use is what governs. The use of the roads, required as part of the mining operation, takes mining outside of LC 16.257(3), if any examination of LC 16.257 should occur at all. The current decision holds that the QM zone points to the Site Review Procedures section, and that therefore one must look also at the potential exemptions in LC 16.257(3). If a necessary component of quarries (or this quarry) includes transportation off site, why does that (purported) exemption necessarily apply to quarries? *Isn't it more reasonable to say instead that the pointer statute says look to all of LC 16.257, and if the (3) exemption doesn't apply to the particular use, it just doesn't apply?* Case law from 1984 to 2011 tells us that accessory and necessary transportation uses are a part of the use subject to scrutiny in a zone. To allow Defendants to draw a line that they contend separates those necessary uses from the underlying use is error. If that line were actually in place depending on the underlying use and there being no necessary or accessory actual use in the 200 foot area, the LC 16.257(3) potential exemption might apply. So it may simply be that the pointer from LC 16.216 does not as a practical matter generally include LC 16.257(3), which would of course be consistent with the previous 1995 decision.

It is worth noting that but for the decision in the current case that site review cannot be allowed as to the mining activity itself, there would be no quandary as to this necessary transportation activity. Because if site review were required for the dominant activity, the conflict Defendants perceive with a non-discretionary escape clause would simply not exist. Another possible way out of this quandary can be found in the *Wilson* case, supra, p. 5, where LUBA pointed out that if the applicant dedicates right of way to the local transportation

authority, and that dedication is accepted, such public right of way can cross various zones, as has always been the case. So the impossibility that Defendants argue here is not accurate, but to the extent it may exist as to others, LUBA and other authority are in accord that the uses may then not practically be allowed. Nor is it all that uncommon that dedications of rights of way be required as a condition of development. To the extent that such dedication and acceptance may be a problem with the road authority, this is in essence a buyer beware consideration for developers, to make sure that all necessary and accessory uses of the property may be permitted (here, absent site review).

CONCLUSION

The 1995 case reasonably determined that Site Review did apply. This determination was reasonable because one may not arbitrarily separate necessary uses from the use subject to review, because LC 16.216 makes specific reference to Site Review, and because there are a plethora of Code provisions that point to mitigating impacts such as those evident to the Hearings Official in this case. LC 16.216 may plausibly require Site Review, because it includes those very words. LC 16.257 may be plausibly read to not exempt necessary uses that are in fact core to the underlying use. These provisions may all be read in context, such that a circular result does not attach and defeat review of impacts that have been reasonably reviewed in the past.

Reconsideration should be granted, and the current decision reversed. There were 9 days plus the one added by Defendants where fines were sought of $330 per day, and the second notice sought 4 days of fines at $1170 per day, for a total amount of $7,980.00. Those fines should be upheld.

DATED this 24 day of February 2012.

LANE COUNTY OFFICE OF LEGAL COUNSEL

MARC KARDELL, OSB 82464
Of Attorneys for Lane County